District of Columbia
Office of Administrative Hearings
941 North Capitol Street, N.E., Suite 9100
Washington, DC 20002
TEL: (202) 442-8167
FAX: (202) 442-9451

THOMAS PIERRE, Tenant/Petitioner, v. KLS, INC., Housing Providers/Respondents.	Case No.: RH-TP-07-29023 *In re*: 103 Kennedy St., N.W. Unit 2

FINAL ORDER

I. Introduction

On February 13, 2008, this matter was called for hearing as scheduled, and after an earlier continuance had been granted. Tenant/Petitioner Thomas Pierre (Tenant) appeared and testified as the only witness in the case. Housing Provider did not appear. For reasons discussed below, I find that Housing Provider's failure to appear was not excusable and I deny Housing Provider's belated request for a continuance. Based on Tenant's testimony and the other evidence received at the hearing in Housing Provider's absence, I award Tenant $374.64 on account of Housing Provider's reduction in services and facilities.

Tenant filed Tenant Petition (TP) 29,023 on July 27, 2007, alleging violations of the Rental Housing Act of 1985 by Housing Provider KLS, Inc., at the Housing Accommodation, 103 Kennedy Street NW, Unit 2. The tenant petition asserted that: 1) A rent increase was taken while his unit was not in substantial compliance with D.C.

Housing Regulations; 2) services and facilities in his unit had been substantially reduced; and 3) retaliatory action had been directed against Tenant. Housing Provider received notice of the scheduled hearing but did not appear at the hearing or give notice to this administrative court that he was unable to appear. Because Housing Provider's failure to appear at the hearing and later request for a continuance raise crucial preliminary issues of procedure and jurisprudence, I will evaluate these issues before I discuss the merits of Tenant's case.

II: Housing Provider's Request for a Continuance

A. Findings of Fact

1. The Tenant Petition (TP) in this matter was filed on July 27, 2007, naming KLS, Inc., c/o Wilton Lash (agent), as Housing Provider.

2. The hearing was originally scheduled for November 28, 2007, but was continued at Tenant's request to February 13, 2008.

3. Notice of the February 13, 2008, hearing at 3:00 p.m. was sent to both parties on November 27, 2007. The United States Postal Service confirmed that the notice was delivered to Housing Provider/KLS, Inc. c/o Wilton Lash on November 29, 2007.

4. In my Order, served on November 27, 2008, I justified a continuance by stating that Tenant had "obtained the consent of the Housing Provider for the continuance and offered three alternative dates, in compliance with OAH Rule 2812.5 and the Case Management Order sent to the parties on

October 25, 2007." Included in that decision was an order that the Case Management Order (CMO) remained in effect.

5. One requirement specified in the CMO on page 5 is that a moving party must first seek to obtain the consent of the other party before filing a motion to continue.

6. When the hearing was called on February 13, 2008, the Tenant appeared with a Tenant Advocate. No one appeared for the Housing Provider.

7. Tenant testified at the hearing.

8. On February 21, 2008, this Office of Administrative Hearings (OAH) received a letter from Duke Lash[1] that I construe as Housing Provider's Motion to Continue. The letter, postmarked on February 19, 2008, is dated February 15, 2008, two days after the hearing.

9. The letter states:

> I regret my absence on February 13, 2008 for the scheduled court hearing. Due to unforeseen circumstances involving a heat emergency located at a rental property in Baltimore, Maryland.
>
> I respectfully request another hearing to be schedule [sic] in order to have the opportunity to properly address the complaints regarding the hearing notice.

10. There is no indication that a copy of the letter was sent to Tenant or that Housing Provider had requested Tenant's consent to the request.

[1] It is unclear from the record whether "Duke" and "Wilton" refer to the same "Mr. Lash" with whom Tenant dealt. Because Duke Lash sent emails to Tenant and signed the request for a new hearing date, I refer to him as Housing Provider throughout.

B. Conclusions of Law

The first issue for decision is whether Housing Provider's request to reopen this matter for a second trial should be granted because he did not appear for the scheduled hearing. Appellate authority and OAH Rules advise against a continuance on the facts of this case.

For example, a Housing Provider's failure to appear at a Rental Housing Hearing led to judgment for the tenant petitioner and dismissal of an appeal in *Kraemer v. Wilson*, TP 27,364 (RHC June 1, 2004). When a housing provider failed to appear at his rental housing hearing, his appeal to set aside a default judgment was denied in *Radwan v. District of Columbia Rental Housing Comm'n,* 683 A.2d 478 (D.C. 1996).

Application of the Rules of this Office of Administrative Hearings (OAH), leads to the same result. When a party requests a continuance before a hearing, he prevails if he can show reasonable cause. OAH Rule 2811.6. If, however, the request is made after the scheduled date, as made here, he must prove "excusable neglect." *Id.* The term "excusable neglect" was analyzed in *Frausto v. U.S. Dep't of Commerce*, 926 A2d 151 (2007), in the context of a request for a new trial under Sup. Ct. Civ. R. 60; and in *Pioneer Inv. Serv. Co. v. Brunswick Assocs. P'ship,* 507 U.S. 380, 395 (1993), a bankruptcy case following a tardy filing of a proof of claim.

"The ordinary meaning of 'neglect' is to 'give little attention or respect' to a matter, or, closer to the point for our purposes, 'to leave undone or unattended to especially through carelessness.'" *Pioneer Inv. Serv. Co.,* 507 U.S. at 388. (quoting Webster's Ninth New Collegiate Dictionary 791 (1983)).

In this case, Housing Provider's failure to appear for the hearing and his failure to ask for a new hearing date in a timely manner were neglectful omissions because necessary acts were left undone and unattended to. To determine if the neglect was excusable, it is necessary to consider all relevant circumstances surrounding the party's omission. *Pioneer, supra*, 507 U.S. at 395. Those factors include whether the movant had actual notice, the reason for the delay, length of the delay, danger of prejudice to the other party and whether the party moving for a continuance acted in good faith. *Id; Frausto, supra*, 926 A2d at 154.

Housing Provider clearly had notice of the hearing, as shown by the letter requesting a new hearing date. His reason for the failure to appear at the hearing was that he had an emergency in another rental property. Such a reason, if made before the hearing was called at 3:00 p.m., might have been grounds for a continuance. However, the request was not made in a timely way, nor was any reason given for why the request was not made sooner. No call was placed to OAH before the hearing was called explaining that an emergency prevented Housing Provider from attending. No evidence has been produced to show that Housing Provider contacted Tenant about the request before the letter was filed. In fact, there is no indication that Tenant was served with the request for a new hearing date. Furthermore, the letter by its terms was written two days after the hearing and mailed two days after that, undermining any suggestion of good faith. One seeking a ruling of "excusable" neglect would be expected to act more promptly.

Finally, is the question of prejudice to Tenant were Housing Provider's request for a new hearing granted. Tenant appeared at the hearing, testified and offered exhibits.

If Housing Provider's request were granted, Tenant would need to begin his case anew, with the necessary preparation. Any relief would be delayed further. Tenant would be inconvenienced by needing to travel again to the hearing and work around his job schedule. In short, he would be prejudiced by delay, inconvenience, and the need to repeat a case he already presented.

In this case, Housing Provider has not shown that his neglect to appear for hearing was excusable. Therefore, the request for a new hearing date is denied. The merits of Tenant's Petition must be addressed.

III: Merits of Tenant Petition

A. Findings of Fact.

1. Tenant began renting Unit 2 at 103 Kennedy Street, N.W. from Housing Provider in October 1, 2004, for a rent of $681.

2. In November or December 2004, Tenant noticed a puddle on the kitchen floor from a leak in the refrigerator. Tenant also noted the stove did not have a pilot light. He reported these problems to Housing Provider by telephone and in person in December 2004.

3. Tenant also noted cracks in the walls and ceilings, which he reported to Housing Provider in January or February 2005.

4. In January 2005, Tenant noticed that the bathroom door did not function properly.

5. In an email dated August 29, 2005, Duke Lash told Tenant that the refrigerator would be replaced and new temperature knob placed on the stove.

6. On October 5, 2005, Tenant returned home to find the bathroom sink in his bedroom, toilet in the hall, and sink in the living room. Within two days, the fixtures were reinstalled in the bathroom. PX 100.

7. Toward the end of 2005, Tenant noticed a problem with mice in this unit, a problem he reported to Housing Provider who put mousetraps down in the apartment. Tenant kept Housing Provider informed that the problem persisted. In February of 2008, Housing Provider sent exterminators to the building.

8. On June 6, 2006, Housing Provider served Tenant with a 30 day Notice to Vacate. PX 104. In response, Tenant sent Housing Provider an email asking what prompted such a Notice. Housing Provider then sent Tenant a complaint that had been made against him (Tenant) with the name of the complainant redacted. The complaint erroneously accused Tenant of an offensive act.[2]

9. In July 2006, a housing inspector issued a Notice of Violation for a missing temperature knob and pilot light in the kitchen stove in Tenant's unit. PX 103. In August 2007, Mr. Lash replaced the stove and refrigerator in Tenant's unit.

[2] Tenant does not claim an unlawful Notice to Vacate. He alleges the Notice was retaliatory.

10. At the time of hearing, Tenant was paying $699 for rent. His rent had been increase twice during his tenancy, although the dates of those rent increases are not in the record.

B. Conclusions of Law

This matter is governed by the Rental Housing Act of 1985, D.C. Official Code §§ 42-3501.01-3509.07 (Act), the District of Columbia Administrative Procedure Act (DCAPA), D.C. Official Code §§ 2-501-511, and the District of Columbia Municipal Regulations (DCMR), 1 DCMR 2801-2899, 1 DCMR 2920-2941, and 14 DCMR 4100-4399.

The Office of Administrative Hearings (OAH) Establishment Act transferred the adjudicatory authority of several District of Columbia agencies, including the Rent Administrator, to OAH. D.C. Official Code § 2-1831.01; 1831.03 (b-1)(1).

A. Claim for Housing Code Violation

Tenant alleges that his is entitled to relief for the problem with mice in his unit. Unless a rental unit is in substantial compliance with the housing code, a housing provider may not increase rent. § 42-3502.08 (a)(1)(A). Under applicable regulations, presence of rodents in a rental unit is a substantial housing code violation. 14 DCMR 4216.2.

Tenant, therefore, would be entitled to a refund on any rent increases taken from December 1, 2005, when Tenant noticed the rodent problem and notified Housing

Provider, until July 27, 2007, the date the TP was filed. However, such an award cannot be made because the dates of the increases are not in the record before me.

Tenant also alleges that cracks in walls and ceiling and a problem with the bathroom door were housing code violations. Even assuming that they were violations of the housing code, however, the cracks and door problem do not rise to the level of "substantial," that would entitle Tenant to a remedy.

B. Claim for Reduction in Services and Facilities

Is Tenant entitled to a refund of rent charged for failure of Housing Provider's workers to reinstall bathroom fixtures in a timely manner, problems with the kitchen stove and refrigerator, and problems with mice?

The facts in this case straddle two versions of one statutory provision in the Rental Housing Act. Before August 5, 2006, the remedy for a decrease in related services was a decrease in the rent ceiling. D.C. Official Code § 42-3502.11. In this case, there is no record of the rent ceiling and, consequently, no authority to make an award for a decrease in related services before August 5, 2006. However, a statutory change to D.C. Official Code § 42-3502.11, effective August 5, 2006, provides for a decrease in rent charged when a decrease in related services and facilities has been proven.

A housing provider may not be found liable for substantial reduction in related services unless the housing provider has been put on notice of the existence of the conditions. *Calomiris Inv. Corp. v. Milam*, TP 20,144 and TP 20,160 and 20,248 (Apr.

26, 1989). The Rental Housing Commission has held consistently that the hearing examiner, now the Administrative Law Judge, is not required to assess the value of a reduction in services and facilities with "scientific precision," but may instead rely on his or her "knowledge, expertise and discretion as long as there is substantial evidence in the record regarding the nature of the violation, duration, and substantiality." *Kemp v. Marshall Heights Cmty. Dev.*, TP 24,786, (RHC Aug. 1, 2000) at 8 (*citing Calomiris v. Misuriello*, TP 4809 (RHC Aug. 30, 1982) and *Nicholls v. Tenants of 5005, 07, 09 D St., S.E.*, TP 11,302 (RHC Sept. 6, 1985)).

Tenant alleges that removal of bathroom fixtures to living spaces, forcing him to sleep elsewhere, was a substantial reduction in services. I agree that arriving home to find bathroom fixtures in the living areas was a shock and inconvenience. However, that inconvenience did not rise to the level of "substantial" reduction in services and facilities entitling Tenant to a reduction in rent because it only lasted two days.

Tenant also alleges that the difficulties he had with the kitchen stove and refrigerator constituted substantial reduction in services and facilities. I have unrebutted testimony that Tenant notified the Housing Provider of leaking from the refrigerator and absence of pilot light in the stove by December 2004. Those appliances were not replaced until August of 2007. The appliances were problematic, but functional. Therefore, only a modest reduction in rent is warranted. I award $10.00 for the problem with each appliance, for a total of $20 for each month from August 5, 2006, the date of the statutory amendment until July 27, 2007, the date the petition was filed, plus interest until the date of the decision. The chart in Appendix B shows the calculation.

The failure to provide services to abate the problem with mice was also substantial decrease in a related service, entitling Tenant to an additional $10 per month in rent reduction from August 2006 until the date the petition was filed, plus interest through the date of the decision.

C. Retaliation

Finally, Tenant alleges that the Notice to Vacate served on him on June 6, 2006, was retaliatory in violation of the Rental Housing Act. Tenant can succeed on this claim by proving that within six months of his engaging in a "protected act" Housing Provider took certain statutorily defined "housing provider action." If he succeeds in meeting the threshold requirements, Tenant benefits from a presumption of retaliation, including that the housing provider took "an action not otherwise permitted by law," unless Housing Provider "comes forward with clear and convincing evidence to rebut this presumption." D.C. Official Code § 42-3505.02 (b); *DeSzunyogh v. Smith*, 604 A.2d 1, 4 (1992); *Twyman v. Johnson*, 655 A.2d 850, 858 (D.C. 1995).

First, the analysis begins with "housing provider action," which includes seeking "to recover possession of a rental unit." D.C. Official Code § 42-3505.02(a). Second, Tenant must have exercised a right, including that he contacted District government officials concerning housing regulation violations, legally withheld rent after giving notice of housing code violations, made efforts to secure other rights under the Act, or brought legal action against the Housing Provider. D.C. Official Code § 42-3505.02(b). Third, Tenant must show that she exercised a right under Act within *six months* of the housing provider's action. D.C. Official Code § 42-42-3505.02 (b).

If Tenant meets those three criteria, he benefits from a presumption that Housing Provider retaliated against him. The burden then shifts to Housing Provider to rebut the presumption with clear and convincing evidence. *Id.* However, if Tenant fails to meet the three threshold criteria, he is not entitled to the presumption of retaliation.

When the statutory criteria are applied to the facts of this case, the following picture emerges. Tenant complained to Housing Provider about mice in the rental unit in December 2005. Such an action was an exercise of a right under the Act. Within six months, on June 6, 2006, Housing Provider sent Tenant a Notice to Vacate, citing a complaint from another tenant. That Notice was housing provider action under the Act.

Therefore, Tenant benefits from a presumption of retaliation because he meets the threshold criteria ---that housing provider action followed his protected acts within six months. The burden then shifts to Housing Provider to rebut that presumption with clear and convincing evidence, which Housing Provider could not produce because Mr. Lash did not appear at hearing to present his defense.

Because of the retaliatory conduct, Housing Provider is subject to a fine of up to $5,000 if its actions were willful. D.C. Official Code § 42-3509.01 (b) (3); *Miller v. D.C. Rental Hous. Comm'n*, 870 A.2d 556 (D.C. 2005). The fine may be imposed "only where the housing provider intended to violate or was aware it was violating the Rental Housing Act."

The Notice to Vacate was based on a third party's complaint, which may have been in error, but there is no evidence suggesting that Housing Provider knew there was an error in the complaint. Nor is there evidence to prove that Housing Provider intended

or was aware he was violating the Act. Consequently, no fine is imposed. *See Miller,* 870 A.2d at 559-560.

Therefore, it is this **30th** day of May, 2008:

ORDERED, that Housing Provider pay Tenant **THREE HUNDRED SEVENTY-FOUR DOLLARS AND SIXTY-FOUR CENTS ($374.64)**, including interest for reduction in services; and

ORDERED, that Tenant's claim for retaliation is **GRANTED;** and it is further

ORDERED, that no fine is imposed; and it is further

ORDERED, that the appeal rights of any party aggrieved by this order are set forth below.

/s/

Margaret A. Mangan
Administrative Law Judge